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Where Does TSCA End and CERCLA Begin? *Be All That You Can PCB*

Ms. Kate Barfield

Question: When can a PBC¹ cleanup be handled under the risk-based approach of the Comprehensive Environmental Response, Compensation, and Liability Act,² (CERCLA), instead of the Toxic Substances Control Act³ (TSCA)'s numerical cleanup standards?

Why Think About This: CERCLA promotes the notion that cleanup standards should be based on risk and site-by-site assessments. TSCA invokes the idea of numerical standards -- clean to a certain level, unless there is a reason not to. So, suppose you are in the midst of a CERCLA cleanup and among the types of contamination to be addressed are PCBs. Which approach do you take -- the risk-based CERCLA option or a blanket application of TSCA's numerical standards?

The answer will depend on the facts of the cleanup. Should you have the proper type of site -- say, one with little likelihood of residual environmental impact -- the EPA may permit a CERCLA-esque risk-based approach. Since your decision will be fact driven, here is some background to assist you to determine the appropriate course of action.

TSCA and PCBs: The scope of TSCA and its definitions is extraordinarily broad.⁴ The bulk of TSCA's key requirements apply to persons who

¹ Polychlorinated biphenyls. This substance was once commonly used in electrical transformers and capacitors.

² 42 U.S.C. § 9601, *et. seq.*

³ 15 U.S.C. § 2601, *et. seq.*

⁴ The EPA's authority under TSCA is focused on the ability to require the following:

manufacture and process chemical substances that are distributed into commerce. TSCA § 2605 authorizes EPA to prohibit or limit the manufacture, processing, distribution, use or disposal of chemical substances found to present an unreasonable risk of injury to health or the environment. The EPA has sought to expand its authority to regulate specific substances, such as PCBs. In particular, TSCA § 2605(e)(1) requires that the EPA Administrator promulgate rules for the disposal of PCBs, which led to the development of the PCB Mega Rule.⁵ Note that although TSCA does not generally apply to federal agencies, DoD has been made subject to TSCA by Executive Order and DoD policy.⁶

The PCB Mega Rule on TSCA and CERCLA: The PCB Mega Rule outlines PCB cleanup requirements, but does not say how TSCA will interface with CERCLA (hazardous substance cleanups) or RCRA⁷ (hazardous waste corrective actions).⁸ What it does say is this:

- 1) TSCA does not affect the applicability of other laws, such as RCRA and CERCLA.
- 2) When more than one requirement may apply, the more stringent approach must be taken.⁹

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- (a) Inventory of Chemical Substances.
 - (b) Reporting and Recordkeeping Requirements.
 - (c) Import and Export Requirements.
 - (d) New Chemical Review and Premanufacture Notices.
 - (e) Testing of Existing Chemicals.
 - (f) EPA authority to refer responsibilities to other agencies.
 - (g) Direct Regulation of Existing Chemical Substances.

⁵ See generally, 40 C.F.R. Part 761.

⁶ Executive Order 12088, Federal Compliance with Pollution Control Standards (13 Oct. 78), and Department of Defense Instruction 4715.6, Environmental Compliance (24 April 96).

⁷ The Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et. seq.*

⁸ See, 40 C.F.R. Part 761, Subpart G. Look in vain for more guidance. TSCA's Section 2608, entitled "Relationship to other Federal laws," was intended to prevent overlap and unnecessary duplication of toxic substance regulation. This looks hopeful -- at first. But, this Section mainly provides the EPA with guidelines on how it can refer duties to other agencies. It provides little help on how to resolve conflicts among regulatory approaches.

Likewise, few cases craft a line between TSCA and CERCLA. Instead, Courts seem to assume that the two laws would work seamlessly together. In fact, the bite of specific TSCA penalties often finds its origin in CERCLA's notion of strict and joint/several liability. Meaning that TSCA relies on CERCLA's overarching reach to bring in and hold liable parties to deal with past contamination. As such, little conflict is anticipated between CERCLA and TSCA. See for example, Reading Co. v City of Philadelphia, 823 F. Supp. 1218 (D. Pa 1993).

⁹ 40 C.F.R. § 761.120(e)(1).

The Mega Rule goes on to say that RCRA corrective actions and CERCLA remediation may result in "different outcomes" from the traditional TSCA approach to PCB spills.¹⁰ But, the Rule does not provide any further details on how to resolve conflicts among regulatory approaches -- other than to advise taking the stricter approach.

This implies that TSCA's fairly strict numerical approach -- one cleans to preset levels -- should be favored over a more flexible, site-by-site consideration of risk. But the Mega Rule anticipates that a risk-based (CERCLA-type) approach may be quite appropriate for certain types of PCB cleanup. So what's a responsible party to do?

First, look at TSCA's Mega Rule. If your remediation lends itself to a risk-based cleanup, you may be able to use a more flexible approach. (Note that large cleanups involving high levels of PCBs may require strict adherence to TSCA's numerical standards.) Here are your options:

PCB Cleanup Approaches: TSCA's Mega Rule anticipates different approaches to remediation, including the use of risk-based standards. These options are:

- 1) *Spills that require more stringent cleanup levels.*¹¹ This may involve a site where there is a high potential that groundwater contamination will linger after cleanup.¹²
- 2) *Site-by-site application of less stringent or alternative cleanup requirements.*¹³ This is your risk-based option and is discussed below.
- 3) *Cleanup of spills exempted from the Mega Rule.* This option also allows for a site-by-site decision regarding cleanup standards, but the emphasis is on the necessity for more control or a totally different approach.¹⁴

Risk-Based Cleanup: If circumstances provide, EPA will allow the use of more flexible standards in a PCB cleanup. The Agency would require the

¹⁰ 40 C.F.R. § 761.120(e)(2). This paragraph states that "inevitably" there will be times when TSCA standards will be applied to cleanups undertaken in accordance with other laws, such as CERCLA or RCRA. In such circumstances, alternate outcomes may result because these laws involve "different or alternative" decisionmaking factors. So, the EPA recognizes the problem, but provides little advice on how to resolve these potential conflicts.

¹¹ 40 C.F.R. § 761.120(b).

¹² 40 C.F.R. § 761.120(b)(1).

¹³ 40 C.F.R. § 761.120(c).

¹⁴ 40 C.F.R. §§ 761.120(d); 761.120(a)(1). The rationale is that some spills may involve more pervasive contamination, so a blanket approach should not be taken.

responsible party to demonstrate that cleanup to numerical standards is "clearly unwarranted" or that such compliance is not feasible.¹⁵ This means that you need to consider the following:

- (a) That the determination can only be on a site-by-site basis.
- (b) The facts must demonstrate that a more extensive cleanup is not warranted because of: (i) risk-mitigating factors; (ii) compliance with TSCA procedures or numerical standards is impractical given the circumstances at your site or; (iii) that these site-specific issues make the cleanup cost-prohibitive, and
- (c) The EPA agrees that a risk-based approach is OK. (The EPA may consider the impact of this decision on other sites to ensure consistency of spill cleanup standards.)¹⁶

As a practical matter, you will consider these options in light of your cleanup facts. The determinative issue will be the amount of PCBs released. If your cleanup does not involve significantly high levels of PCBs and the issue of potential contamination (mainly to groundwater) does not loom large, you may be able to use a flexible remediation approach. To justify your application to the EPA, you will be required to demonstrate that your proposed risk-based approach will be protective, given the facts of your cleanup. You do so by presenting data confirming your assumptions about the level of risk involved, while outlining the exact method of remediation.

PCB Disposal: Remediation often involves the issue of disposal -- what do you do with the PCBs you have unearthed? Well, the PCB Mega Rule has also incorporated risk-based principles in its requirements for the disposal of PCB-contaminated soil. The general rule is: a responsible authority may dispose of soil contaminated with a PCB concentration of less than 50 ppm at a municipal nonhazardous waste site. If the soil is contaminated at a concentration equal to, or in excess of, 50 ppm, the responsible party would likely send the soil to a RCRA landfill or a TSCA-qualified landfill.¹⁷ Disposal options are:

- 1) *Self-implementing disposal.*¹⁸ This form of disposal is similar to the PCB Spill Cleanup Policy. This approach also incorporates risk-based, site-specific issues into plans for disposal.

¹⁵ 40 C.F.R. § 761.120(c).

¹⁶ 40 C.F.R. § 761.120(c).

¹⁶ 40 C.F.R. §§ 761.61(a)(5)(i)(B)(2)(ii); (iii).

¹⁶ 40 C.F.R. § 761.61(a).

¹⁶ 40 C.F.R. § 761.61(b).

¹⁶ 40 C.F.R. § 761.61(c).

- 2) *Performance-based disposal*.¹⁹ This would involve the use of existing and approved disposal technologies.
- 3) *Risk-based disposal*.²⁰ As with risk-based remediation, this option allows for the disposal of PCB remediation waste in a manner different than options #1 or 2, as long as the EPA agrees.

Regulatory Roundup: The PCB Mega Rule explicitly provides the option of risk-based cleanup/disposal -- largely based on the PCB concentrations at issue. This option would allow a remediation agent to step out of TSCA's numerically driven approach (clean to a preset level, no matter what) and move towards a CERCLA-esque approach (site-specific risk levels). This flexibility is particularly important when approaching the cleanup of moderately-sized sites where there is little likelihood of residual contamination. Should the regulator agree that a flexible approach makes sense, you could tailor a cleanup solution to meet your needs. (Ms.Barfield/RNR).

4th Circuit Cites *Laidlaw* to Lay Law Down

LTC David B. Howlett

The Court of Appeals for the 4th Circuit, sitting *en banc*, recently reversed its earlier decision in a Clean Water citizen suit. Citing recent Supreme Court precedent, the Court of Appeals found in Friends of the Earth v. Gaston Copper Recycling Corporation²¹ that at least one of the citizens involved had jurisprudential standing to pursue the case.

Gaston Copper operated a smelting facility in South Carolina and was subject to a Clean Water Act NPDES permit.²² The company's discharges frequently exceeded the limits in the permits.

Two environmental groups sued Gaston Copper under the citizens' suit provision of the Clean Water Act, which states that "any citizen may commence a civil action on his own behalf against any person . . . who is

²¹ 204 F.3d 149; 2000 U.S. App. LEXIS 2684, February 23, 2000.

²² National Pollution Discharge Elimination System, Clean Water Act, §402, 33 U.S.C. § 1342.

alleged to be in violation of an effluent standard or limitation under this chapter."²³ This includes violations of NPDES permits. The act defines "citizen" as "a person or persons having an interest which is or may be adversely affected."²⁴ Congress intended that this provision confer standing to the full extent allowed by the Constitution.²⁵

One plaintiff group member was Mr. Shealy. He lives next to a pond four miles downstream from the Gaston plant. He stated that the pollution or threat of pollution from Gaston had made his family curtail its fishing and swimming activities out of fear of the adverse effects the pollutants could cause. The district court dismissed the suit after a six day trial, finding that none of the plaintiffs' members had standing because they had not shown "injury in fact."²⁶ The district court pointed to the absence of certain types of evidence: "No evidence was presented concerning the chemical content of the waterways affected by the defendant's facility. No evidence of any increase in the salinity of the waterways, or any other negative change in the ecosystem of the waterway was presented."²⁷ The original panel of the Court of Appeals upheld this decision.²⁸

The *en banc* court began its discussion by setting out the Article III constitutional minimum for standing: a plaintiff must allege (1) injury in fact; (2) traceability; and (3) redressability. The injury in fact prong requires that a plaintiff suffer an invasion of a legally protected interest which is concrete and particularized, as well as actual or imminent. The traceability prong means it must be likely that the injury was caused by the conduct complained of and not by the independent action of some third party not before the court. Finally, the redressability prong entails that it must be likely, and not merely speculative, that a favorable decision will remedy the injury.²⁹

The court also noted that the Supreme Court had recently held that an effect on "recreational, aesthetic, and economic interests" is cognizable injury for purposes of standing.³⁰

Examining the status of Mr. Shealy, the Court of Appeals found that he had produced evidence of actual or threatened injury to a waterway in which

²³ 33 U.S.C. § 1365(a).

²⁴ 33 U.S.C. § 1365(g).

²⁵ See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16, 69 L. Ed. 2d 435, 101 S. Ct. 2615 (1981) (citing S. Conf. Rep. No. 92-1236, at 146 (1972), reprinted in 1972 U.S.C.A.N. 3776, 3823).

²⁶ 9 F.Supp. 2d 589 (D.S.C. 1998).

²⁷ *Id.* at 600.

²⁸ *Friends of the Earth v. Gaston Copper Recycling Corp.*, 179 F.3d 107 (4th Cir. 1999).

²⁹ *Friends of the Earth v. Gaston Copper Recycling Corporation*, 2000 U.S. App. LEXIS 2684 at *12-13, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992).

³⁰ *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 145 L. Ed. 2d 610, 120 S. Ct. 693, 705 (2000). The concurring opinions to the Court of Appeals case under discussion argue that the *Laidlaw* decision itself, rather than preexisting jurisprudence, required reversal.

he has a legally protected interest. In fact, Shealy alleged precisely those types of threats to swimming and fishing that Congress intended to prevent by enacting the Clean Water Act.³¹ The court continued:

Shealy is thus anything but a roving environmental ombudsman seeking to right environmental wrongs wherever he might find them. He is a real person who owns a real home and lake in close proximity to Gaston Copper. These facts unquestionably differentiate Shealy from the general public. The company's discharge violations affect the concrete, particularized legal rights of this specific citizen. He brings this suit to vindicate his private interests in his and his family's well-being -- not some ethereal public interest. We in turn are presented with an issue "traditionally thought to be capable of resolution through the judicial process."³²

Regarding the district court's requirement of actual evidence of damage to the water, the court found that this would eliminate claims of those who were directly threatened but not yet engulfed by the unlawful discharge. Shealy's reasonable fear and concern are sufficient impact; he does not have to wait until his lake becomes barren. The court also noted that the Supreme Court did not require actual damage in Laidlaw.³³

Having found injury in fact,³⁴ the court also found that the injury was "fairly traceable" to Gaston Copper. Plaintiffs had produced evidence to show that Shealy's lake was within the range of the discharge. The court concluded that the injury was redressable by the court, especially since Gaston Copper's violations continued throughout the period of the litigation.

Interestingly, the court found not only that Article III did not require rejection of Shealy's claims, but that the Constitution's separation of powers structure *prohibited* it. To bar the suit would undermine the citizen suit provision of the Clean Water Act. This, in turn, would undermine Congress, and "separation of powers will not countenance it."³⁵

Army lawyers must still examine citizen suit claims carefully to determine whether plaintiffs or members of plaintiff organizations have standing. To the extent standing requirements may have been tightened under the original

³¹ Friends of the Earth v. Gaston Copper Recycling Corporation, 2000 U.S. App. LEXIS 2684 at *21. See 33 U.S.C. §1251(a)(2).

³² Friends of the Earth v. Gaston Copper Recycling Corporation, 2000 U.S. App. LEXIS 2684 at *22-23.

³³ Friends of the Earth, Inc. v. Laidlaw, 120 S.Ct. at 705.

³⁴ The Court of Appeals remanded the case to the district court to determine "injury in fact" in the light of Friends of the Earth, Inc. v. Laidlaw.

³⁵ Friends of the Earth v. Gaston Copper Recycling Corporation, 2000 U.S. App. LEXIS 2684 at *36.

Gaston Copper decision, they have now been loosened again under Laidlaw.
(LTC Howlett/LIT)